

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WAYNE BERRY,

Plaintiff,

vs.

DEUTSCHE BANK TRUST COMPANY
AMERICAS (f.a. BANKERS TRUST COMPANY)
and JP MORGAN CHASE BANK, in their separate
capacities and as agents for the pre- and post-petition
lenders of Fleming Companies, Inc.; GENERAL
ELECTRIC CAPITAL CORPORATION; C&S
WHOLESALE GROCERS, INC.; THE POST-
CONFIRMATION TRUST OF FLEMING
COMPANIES, INC.; ROBERT KORS; CORE-MARK
HOLDINGS INC. and DOES 1 to 200.

Defendants.

X

: 01:07 CV 7634 WHP
: Judge William H. Pauley III
: ECF Case

:

: DECLARATION F TIMOTHY J.
: HOGAN IN SUPPORT OF
: PLAINTIFF WAYNE BERRY'S
: REQUEST FOR JUDICIAL
: NOTICE IN SUPPORT OF HIS
: MEMORANDA IN
: OPPOSITION TO C&S
: WHOLESALE GROCERS,
: INC'S MOTION TO DISMISS
: SECOND AMENDED
: COMPLAINT ; EXHIBITS "1"
: TO 17

Relates to Docket Entry No. 34.

:

X

DECLARATION F TIMOTHY J. HOGAN IN SUPPORT OF PLAINTIFF WAYNE BERRY'S
REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF HIS MEMORANDA IN OPPOSITION
TO C&S WHOLESALE GROCERS, INC'S MOTION TO DISMISS SECOND AMENDED
COMPLAINT ; EXHIBITS "1" TO 17

TIMOTHY J. HOGAN (Hawaii Bar No. 5312)
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Admitted *Pro Hac Vice*

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DECLARATION OF TIMOTHY J. HOGAN

I, Timothy J. Hogan, an am attorney licensed to practice before all the courts of the state of Hawaii and am admitted to practice before this court, pro hac vice, and hereby declare under penalty of perjury that the following is true and accurate to the best of my knowledge and belief. If called upon to testify regarding the matters contained herein, I am competent and willing to do so. These materials are submitted for consideration and taking of judicial notice in regard to the motions Dismiss filed by C&S Wholesale Grocers, Inc. on December 21, 2007, and to meet the Declaration of Lex Smith.

1. Attached hereto as Exhibit "1" is a true and correct copy of the Second Amended Complaint ("SAC") filed herein on December 21, 2007 as Docket Number 26. Exhibits are intentionally omitted.

2. Attached hereto as Exhibit "2" is a true and correct copy of the Special Jury Verdict filed in *Wayne Berry v. Fleming Companies, Inc.*, 01-CV-00446 SPK LEK (D.Hawaii), on March 6, 2003.

3. Attached hereto as Exhibit "3" is a true and correct copy of the initial Complaint filed in *Wayne Berry v. Hawaiian Express Service, Inc. et al.*, 03-CV-00385-SOM-LEK (D. Hawaii on July 22, 2003.

4. Attached hereto as Exhibit "4" is a true and correct copy of an order filed in *Fleming Companies, Inc. v. Wayne Berry*, Adv. No. 03-54809(MFW), *In re Fleming Companies, Inc.*, Bk. No. 03-10945(MFW) (Bankr. Del.) in which the Delaware Bankruptcy Court denied the request for an injunction *sua sponte* dated August 8, 2003.

5. Attached hereto as Exhibit "5" is a true and correct copy of the First Amended

Complaint filed in *Wayne Berry v. Hawaiian Express Service, Inc. et. al*, CV 03-00385 SOM-LEK (D. Hawaii) on August 13, 2003.

6. Attached hereto as Exhibit “6” is true and correct copy of an Exhibit that served upon me at the Fleming Companies, Inc. Bankruptcy Plan Confirmation Hearing in the United States Bankruptcy Court for the District of Delaware, on July 24, 2004. This document was admitted as part of the record of the Fleming Confirmation Hearing.

7. Attached hereto as Exhibit “7” is a true and correct copy of the Joint Motion of Fleming Companies, Inc. and the Pre-Petition Agents for Authorization Pursuant to Sections 363 and 105 of the Bankruptcy Code, to Pay Amounts to the Pre-Petition Agents on Behalf of the Pre-Petition Lenders, filed on October 10, 2003, in *In re Fleming Companies, Inc.*, Bk. No. 03-10945(MFW) (Bankr. Del.) as Docket Number 4011.

8. Attached hereto as Exhibit “8” is a true and correct copy of an order entered in the Fleming bankruptcy granting Mr. Berry relief from the Automatic Stay. This order was entered on July 24, 2004, prior to the entry of the Order Confirming the Official Committee of Unsecured Creditors Third Amended and Revised Joint Plan of Reorganization of Fleming Companies, Inc. and its Filing Subsidiaries under Chapter 11 of the Bankruptcy Code, filed in *In re Fleming Companies, Inc.*, Bk. No. 03-10945(MFW) (Bankr. Del.) as Docket Number 9044.

9. Attached hereto as Exhibit “9” is a true and correct copy of Plaintiff’s Trial Exhibit “53” admitted into evidence on February 25, 2003, in *Wayne Berry v. Fleming Companies, Inc.*, 01-CV-00446 SPK LEK (D. Hawaii) as set forth in the Hawaii District Court’s Docket entry Number 189.

10. Attached hereto as Exhibit “10” is a true and correct copy of Plaintiff’s Trial

Exhibit “52” admitted into evidence on February 25, 2003, in *Wayne Berry v. Fleming Companies, Inc.*, 01-CV-00446 SPK LEK (D. Hawaii) as set forth in the Hawaii District Court’s Docket entry Number 189.

11. Attached hereto as Exhibit “11” is a true and correct copy of the December 27, 2004, Order Denying Fleming's Renewed Motion for Judgment as a Matter of Law Pursuant to 17 U.S.C. 117, filed on March 20, 2003; Fleming's Renewed Motion for Judgment as a Matter of Law that the ‘End User License Agreement’ is Unenforceable Against Fleming, filed on March 20, 2003; Berry's Motion for Entry of Permanent Injunction, filed March 20, 2003 all renewed on September 17, 2004 filed in *Wayne Berry v. Fleming Companies, Inc.*, 01-CV-00446 SPK LEK (D. Hawaii) on December 27, 2004.

12. Attached hereto as Exhibit “12” is a true and correct copy of Fleming PCT’s Reply Brief filed in the appeal of the First Hawaii Case, 9th Circuit Docket Numbers 05-15223 and 0515347 on August 19, 2005, related to the appeal of the judgment in the First Hawaii Case.

13. Attached hereto as Exhibit “13” is a true and correct copy of the Memorandum Opinion Dated July 5, 2007, the Court of Appeals for the Ninth Circuit that also appears as *Berry v. Fleming Companies, Inc.*, 243 Fed. Appx. 260, 262, 2007 WL 1062946 (9th Cir. (Hawaii,2007)).

14. Attached hereto as Exhibit “14” is a true and correct copy of the District Court’s Order Denying Plaintiff’s Motion for a Permanent Injunction in *Berry v. Hawaiian Express Service, Inc.*, et al., 2006 WL 618894, (March 9, 2006, D. Hawaii).

15. Attached hereto as Exhibit “15” is a true and correct copy the June 27, 2005 Order Granting in *Wayne Berry v. Hawaiian Express Service, Inc. et. al*, CV 03-00385

SOM-LEK (D. Hawaii).

16. Attached hereto as Exhibit “16” is a true and correct copy of a letter I received from the office of the General Counsel, Sears Holdings Corp. Dated January 17, 2008 that responded to an inquiry made regarding Kmart’s use of Berry Technology.

17. Attached hereto as Exhibit “17” is a true and correct copy of an email thread that relates to my question regarding the statement in the January 17, 2008 letter that identified Lex Smith’s authority to speak for C&S on Berry infringement matters.

Executed at Honolulu, Hawaii, February 25, 2008.

/S/Timothy J. Hogan

TIMOTHY J. HOGAN